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No. 06-26

In the Supreme Court of the United States

WELDON ANGELOS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI FOR THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's sentence of 55 years of imprisonment, imposed for his conviction on three separate counts of possessing a firearm in furtherance of a drug trafficking crime under 18 U.S.C. 924(c), is grossly disproportionate to his offenses.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-29) is reported at 433 F.3d 738. The opinion of the district court (Pet. App. 30-102) is reported at 345 F. Supp. 2d 1227.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 2006. A petition for rehearing was denied on April 4, 2006 (Pet. App. 103). The petition for a writ of certiorari was filed on July 3, 2006. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial, petitioner was convicted in the United States District Court for the District of Utah of five counts of possession of marijuana with intent to dis-

tribute it, in violation of 21 U.S.C. 841(a)(1) (Counts 1, 3, 5, 9, and 13); three counts of possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c) (Counts 2, 4, and 10); two counts of possessing a stolen firearm, in violation of 18 U.S.C. 922(j) (Counts 6 and 11); one count of possessing a firearm with an obliterated serial number, in violation of 18 U.S.C. 922(k) (Count 7); two counts of unlawful possession of a firearm by a drug user, in violation of 18 U.S.C. 922(g)(3) (Counts 8 and 12); and three counts of money laundering, in violation of 18 U.S.C. 1956 (Counts 19 and 20) and 18 U.S.C. 1957 (Count 18). He was sentenced to a term of 660 months and one day of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. 1-29.

1. For several years, petitioner, a 24-year-old, trafficked in large quantities of high-grade marijuana. He also distributed cocaine and other narcotics. During that time, petitioner affiliated himself with Varrio Loco Town (VLT), a violent street gang. Consistent with his gang affiliation and participation in the drug trade, petitioner repeatedly armed himself with firearms. Gov't C.A. Br. 4.

a. In April 2002, Ronnie Lazalde began working as a confidential informant for the Salt Lake City Metro Gang Unit, a joint state and federal drug task force. Jason Mazuran, a gang unit detective, learned from several of his informants that petitioner had distributed large quantities of drugs over an extended period of time. Because Lazalde was a member of the same gang as petitioner, Mazuran believed that Lazalde was well-positioned to purchase drugs from petitioner. Gov't C.A. Br. 4-5.

On May 10, 2002, Lazalde met with petitioner at Mazuran's directive. During the meeting, petitioner discussed his drug dealing operation and showed Lazalde a 10-millimeter Glock pistol that he carried in an ankle holster. Petitioner told Lazalde that he had a supplier in California who could provide large quantities of marijuana and cocaine. Thereafter, Lazalde arranged to purchase marijuana from petitioner. On May 21, June 4, and June 18, 2002, Lazalde made three controlled purchases of approximately one-half of a pound of marijuana from petitioner, amounts that Mazuran had dictated, even though petitioner normally sold much larger quantities. The controlled buys occurred in a store parking lot that was close to petitioner's residence on Fort Union Boulevard. Gov't C.A. Br. 5-6.

Petitioner displayed firearms during two of the transactions. At the May 21, 2002, transaction, Lazalde entered petitioner's black BMW and observed lodged between the seat and the center console the same 10-millimeter Glock pistol that petitioner had shown him at their May 10, 2002, meeting. Lazalde suspected that petitioner may have deliberately positioned the gun in that location to intimidate him (Lazalde) and prevent him from attempting to rob petitioner. At the June 4, 2002, transaction, petitioner was carrying the Glock pistol in an ankle holster. As Lazalde approached petitioner to complete the transaction, petitioner lifted his pant leg and displayed the gun to Lazalde. During subsequent debriefings, Lazalde told Mazuran that petitioner had carried a firearm to both buys and that, during the second buy, petitioner had brandished the gun. Gov't C.A. Br. 5-6.

b. On July 11, 2002, police officers arrested petitioner during an unrelated incident at an apartment

complex. At the time of his arrest, petitioner was carrying a stolen 10-millimeter Glock pistol, loaded with 13 hollow point rounds, in a holster on his ankle, and more than $4300 in cash in his pocket. Pétitioner later advised Lazalde of his arrest, and Lazalde immediately reported those facts to Mazuran. Gov't C.A. Br. 6.

c. On November 13, 2002, a federal grand jury in the District of Utah returned a five-count indictment against petitioner charging him with three counts of distributing marijuana, in violation of 21 U.S.C. 841(a)(1); carrying a firearm during and in relation to a drug trafficking crime, or possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c); and possessing a firearm with an obliterated serial number, in violation of 18 U.S.C. 922(k). Pet. App. 4.

d. Two days after his indictment, Mazuran served an arrest warrant on petitioner at his apartment. During a subsequent search, Mazuran recovered more than three pounds of marijuana in a bedroom closet and two bulletproof vests. Mazuran also found a briefcase with more than $22,000 in United States currency, as well as documentation of monies owed to petitioner by other drug dealers (pay/owe sheets), and a fully loaded Glock 17 pistol. Mazuran also seized a safe from the apartment, and a subsequent search of the safe uncovered two other loaded pistols, a large number of prescription pain pills for which petitioner had no prescription, opiate suckers, and more pay/owe sheets. One of the pistols, a Walther, that was found in the safe had been stolen from a third party. Agents also found a new Lexus sedan parked in the garage, which was later determined to have been purchased with more than $30,000 in drug proceeds. Gov't C.A. Br. 7; Pet. App. 4.

e. On December 16, 2002, federal agents assigned to the Task Force obtained a search warrant for petitioner's other residence on Fort Union Boulevard, which led to the discovery of the black BMW used in two of the controlled buys with Lazalde. The trunk of the vehicle contained a pound of marijuana and a Smith and Wesson revolver. A search of the residence itself led to the discovery of a safe in the master bedroom that contained $20,000 in cash and smelled of marijuana. Scales and drug packaging materials were found in the kitchen. Still further investigation of the premises led to the discovery of body armor, an assault rifle, 26 large duffel bags and several large suitcases (each of which was capable of holding at least 50 pounds of marijuana) containing marijuana residue, and more pay/owe sheets. Agents also seized photographs, taken years before the drug distribution charged in the indictment, depicting petitioner displaying firearms while holding large amounts of cash and illegal drugs. Gov't C.A. Br. 7-9.

f. On December 17, 2002, the day after the search of petitioner's Fort Union Boulevard residence, petitioner and his lawyer met with investigators. During that meeting, one of the purposes of which was to decide whether petitioner was willing to cooperate with authorities, petitioner admitted that he had been dealing marijuana and cocaine, and that he was able to obtain large quantities of any substance. No agreement was reached, however, because the agents suspected that petitioner had not been truthful about the source of his supply. Gov't C.A. Br. 11.

g. Following the seizure of the evidence from petitioner's residences, the government provided defense counsel with discovery materials pertaining to that evidence. The government advised counsel of its intent to

supersede the indictment to add additional offenses, but agreed to provide a plea offer before returning to the grand jury. On January 20, 2003, the government offered petitioner an opportunity to plead guilty to two counts of the initial indictment, with an agreed recommendation of 192 months of imprisonment. In addition, the government agreed not to seek a superseding indictment with additional charges. Petitioner rejected the offer. Gov't C.A. Br. 11-12.

h. On June 18, 2003, the grand jury returned a seventeen-count superseding indictment against petitioner adding additional counts of possessing marijuana with intent to distribute, and additional firearms charges, including multiple counts of carrying or possessing a firearm during and in relation to or in furtherance of a drug trafficking crime, possession of a stolen firearm, and possession of a firearm by a drug user. Pet. App. 4.

On October 1, 2003, following the completion of a financial crimes investigation by the Internal Revenue Service criminal investigation office, the grand jury returned a second superseding indictment adding three counts of money laundering. Gov't C.A. Br. 2-3. The second superseding indictment charged petitioner with a total of twenty criminal counts: six counts of distributing marijuana, in violation of 21 U.S.C. 841(a)(1) (Counts 1, 3, 5, 9, 13, and 15); five counts of carrying a firearm during and in relation to a drug trafficking crime or possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1) (Counts 2, 4, 10, 14, and 16); two counts of possessing a stolen firearm in violation of 18 U.S.C. 922(j) (Counts 6 and 11); one count of possessing a firearm which had the importer's and manufacturer's serial number removed, obliterated and altered, in violation of 18 U.S.C. 922(k) (Count 7); three

counts of possessing a firearm while being an unlawful user of controlled substances in violation of 18 U.S.C. 922(g)(3) (Counts 8, 12, and 17); one count of engaging in and attempting to engage in a monetary transaction through or to a financial institution in criminally derived property in violation of 18 U.S.C. 1957 (Count 18); and two counts of conducting and attempting to conduct financial transactions which involved the proceeds of marijuana distribution in violation of 18 U.S.C. 1956(a)(1)(A)(i) (Counts 19 and 20). Pet. App. 4-5.

2. After a jury trial, petitioner was found guilty on 16 of the 20 counts, including three of the five Section 924(c) charges. Of the remaining four counts, one was dismissed by the court and the jury acquitted petitioner on the other three. Pet. App. 4-5.

3. The presentence report (PSR) noted (at ¶¶ 96-97) that the Section 924(c) convictions required the court to impose a 60-month sentence on the first conviction, see 18 U.S.C. 924(c)(1)(A)(i), and consecutive 300-month sentences on the second and third convictions, see 18 U.S.C. 924(c)(1)(C) and (i) ("In the case of a second or subsequent conviction under this subsection, the person shall" "be sentenced to a term of imprisonment of not less than 25 years."); see also *Deal* v. *United States*, 508 U.S. 129, 132-133 (1993) (interpreting the words "second or subsequent 'conviction'" in this provision to encompass multiple convictions obtained in a single proceeding).

4. Upon receipt of the PSR, the district court expressed concern about imposing what it described as "an extraordinarily long prison term," C.A. App. 106, and, for that reason, requested that the parties submit briefs addressing numerous sentencing-related issues, including whether the mandatory minimum sentences re-

quired by Section 924(c), as applied to petitioner, violated equal protection or amounted to cruel and unusual punishment. *Id.* at 106-114 (order delineating issues to be briefed).

5. In response to the court's order, petitioner argued that the Section 924(c) component of the proposed sentence violated his constitutional rights. On November 16, 2004, the district court entered a memorandum and opinion rejecting petitioner's constitutional challenges. Pet. App. 30-102. Although the court expressed the view that the sentence mandated by Section 924(c) in this case might "appear[] to be cruel, unjust, and irrational," *id.* at 33, it recognized that the sentence was "decreed" by the statute, *ibid.*; that "in our system of separated powers Congress makes the final decisions as to appropriate criminal penalties," *ibid.*; and, therefore, that the court's "quite limited" role in evaluating petitioner's constitutional challenges permitted it to set aside the statute "only if it is irrational punishment without any conceivable justification or is so excessive as to constitute cruel and unusual punishment in violation of the Eighth Amendment." *Ibid.* "After careful deliberation," the court concluded that a "fair[] appl[ication]" of controlling case law compelled rejection of petitioner's claims. *Ibid.*

With respect to petitioner's Eighth Amendment claim, the district court focused on whether petitioner's sentence was grossly disproportionate to the offenses at hand. After noting that the precise contours of the Court's "gross disproportionality" principle were "unclear," Pet. App. 88 (quoting *Lockyer* v. *Andrade*, 538 U.S. 63, 64 (2003)), the district court concluded that Justice Kennedy's concurring opinion in *Harmelin* v. *Michigan*, 501 U.S. 957 (1991), provides the governing test.

Pet. App. 88 (citing *Ewing* v. *California*, 538 U.S. 11, 23-24 (2003) (opinion of O'Connor, J.)). Under that test, the district court concluded, a "court must examine (1) the nature of the crime and its relation to the punishment imposed, (2) the punishment for other offenses in this jurisdiction, and (3) the punishment for similar offenses in other jurisdictions." *Id.* at 89.

The district court believed that each of the three *Harmelin* factors supported a conclusion that petitioner's sentence violated the Eighth Amendment. As to the first factor, the court characterized the sentence-triggering conduct as non-violent, consisting of two sales of small amounts of marijuana, while possessing a handgun under his clothing. Pet. App. 90. The court observed that, in the ordinary case, the act of possessing a firearm in relation to a crime triggers a two-level enhancement (a roughly 2-year penalty) under Section 2D1.1 of the Sentencing Guidelines, *id.* at 91, and concluded that the contrast between those sentences "strongly suggests * * * gross disproportionality." *Ibid.* As to the second factor, the court found that the fact that petitioner would receive a "far longer sentence" than persons who, in the court's view, had "committed far more serious crimes," *id.* at 92, supported a determination of gross disproportionality. As to the third factor, the court found in petitioner's favor that petitioner's federal gun sentence was "longer than he would receive in any of the fifty states." *Ibid.*

Although the court expressed the view that petitioner's sentence "violates the Eighth Amendment," Pet. App. 92-93, it ultimately rejected petitioner's claim on the basis of *Hutto* v. *Davis*, 454 U.S. 370 (1982) (per curiam), which rejected an Eighth Amendment challenge to a 40-year sentence imposed for possession of

nine ounces of marijuana worth about $200. Although cognizant "of an argument" that *Davis* had been "implicitly overruled or narrowed" by subsequent decisions, including *Solem* v. *Helm*, 463 U.S. 277 (1983), the court concluded that this Court has, in recent decisions, continued to view *Davis* as "part of the fabric of the law." Pet. App. 93-94. Recognizing its duty to follow precedent, *id.* at 94, the court concluded that *Davis* was materially indistinguishable from petitioner's case, and, on that basis, rejected petitioner's Eighth Amendment challenge. *Id.* at 93 ("[I]f 40 years in prison for possessing nine ounces [of] marijuana does not violate the Eighth Amendment, it is hard to see how 61 years for distributing sixteen ounces (or more) would do so.").[1]

6. The court of appeals affirmed. Pet. App. 1-29. Addressing petitioner's sentencing challenge, the court began by noting that the Eighth Amendment embodies a "narrow proportionality principle" applicable to noncapital sentences. *Id.* at 19. That principle "does not require strict proportionality between crime and sentence," *id.* at 20 (quoting *Ewing*, 538 U.S. at 23), but instead "forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Ibid.* (quoting *Ewing*, 538 U.S. at 23, and *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring)). The court also relied on the fact that this Court has only invalidated two sentences

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[1] While the court rejected petitioner's Eighth Amendment challenge, it recommended "that the President commute this unjust sentence and that the Congress modify the laws that produced it." Pet. App. 102. The court also directed the Clerk's Office "to forward a copy of this opinion with its commutation recommendation to the Office of [the] Pardon Attorney and to the Chair and Ranking Member of the House and Senate Judiciary Committees." *Ibid.*

under a proportionality standard,[2] while rejecting challenges to a number of other sentences,[3] as evidence that the principle is reserved "for only the extraordinary case." *Id.* at 21 (quoting *Lockyer*, 538 U.S. at 77).

"Applying these principles to the case at hand," Pet. App. 21, the court concluded that this was not an "'extraordinary' case" in which the sentence was grossly disproportionate to the crimes for which they were imposed. *Ibid.* The court emphasized that Congress specifically intended "the lengthy sentences mandated by § 924(c)" "(a) [to] protect society by incapacitating those criminals who demonstrate a willingness to repeatedly engage in serious felonies while in possession of firearms, and (b) to deter criminals from possessing firearms during the course of certain felonies." *Id.* at 22; see *Muscarello* v. *United States*, 524 U.S. 125, 132

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[2] See Pet. App. 20 (citing *Weems* v. *United States*, 217 U.S. 349, 367 (1910) (invalidating on Eighth Amendment grounds a sentence of 15 years in chains and at hard labor, plus permanent civil disabilities, for the crime of falsifying a public document), and *Solem* v. *Helm*, 463 U.S. 277 (1983) (invalidating on Eighth Amendment grounds a sentence of life without parole imposed under a state law against a nonviolent recidivist whose final crime was writing a bad check with the intent to defraud)).

[3] In addition to *Davis*, the court of appeals cited *Rummel* v. *Estelle*, 445 U.S. 263 (1980) (life sentence with the possibility of parole under a state recidivist statute for three successive convictions for fraudulent use of a credit card to obtain $80 worth of goods, passing a forged check for $28.36, and obtaining $120.75 by false pretenses); *Harmelin*, 501 U.S. at 1001-1005 (opinion of Kennedy, J.) (life sentence without the possibility of parole for possession of more than 650 grams of cocaine); *Ewing*, 538 U.S. at 30-31 (sentence of 25 years to life under a state recidivist statute for the offense of felony grand theft); and *Lockyer*, 538 U.S. at 77 (two consecutive 25 year sentences under a state recidivist statute for two counts of petty theft). Pet. App. 20-21.

(1998) (Section 924(c)'s "basic purpose" was "to combat the 'dangerous combination' of 'drugs and guns'") (quoting *Smith* v. *United States*, 508 U.S. 223, 240 (1993)). The court also emphasized that all three of the firearms at issue "appear to have facilitated [petitioner's] drug trafficking by, if nothing else, providing protection from purchasers and others," Pet. App. 22-23, and by facilitating his "possession and distribution of illegal drugs." *Id.* at 23 (citing *Harmelin*, 501 U.S. at 1002 ("Possession, use, and distribution of illegal drugs represents one of the greatest problems affecting the health and welfare of our population.") (citation and internal quotation marks omitted)). In light of these strong societal interests and the validity of the penological theories underlying the punishments, the court concluded that "the sentences imposed on [petitioner] are not grossly disproportionate to his crimes." *Id.* at 24; see *id.* at 26-27.

The court of appeals acknowledged that the district court had rejected petitioner's Eighth Amendment argument by relying on *Hutto* v. *Davis*, *supra*, and that petitioner contended that *Davis* is no longer good law. Pet. App. 25. That contention overlooked, the court concluded, that this Court has continued to cite *Davis*, "thereby clearly indicating that the holding in *Davis*" —that a 40-year sentence for marijuana trafficking is not cruel and unusual punishment—"remains 'good law.'" *Ibid.* More importantly, the court of appeals went on to make clear that under *Harmelin*, the threshold question is whether a sentence is "grossly disproportionate to the crime for which it was imposed," *id.* at 25-26, and on that issue, the court of appeals rejected the district court's assessment. "In our view," the court explained, "the district court failed to accord proper deference to Congress's decision to severely punish criminals

who repeatedly possess firearms in connection with drug-trafficking crimes." *Id.* at 26. The court continued as follows:

> [a]lthough it is true that [petitioner] had no significant adult criminal history, that appears to have been the result of good fortune rather than petitioner's lack of involvement in criminal activity. The evidence presented by the government at trial clearly established that [petitioner] was a known gang member who had long used and sold illicit drugs. Further, the government's evidence established that, at the time of his arrest, [petitioner] was a mid-to-high [level] drug dealer who purchased and in turn sold large quantities of marijuana. In addition, the government's evidence established that [petitioner] possessed and used a number of firearms, some stolen, to facilitate his drug-dealing activities. Lastly, the evidence established that although [petitioner] had some involvement in the music industry, he failed to financially profit from that involvement and indeed never reported any positive earnings to the Internal Revenue Service. Thus, the only reasonable inference that could be drawn was that [petitioner's] sole source of income was his drug-trafficking operations.

Id. at 26-27. Because the court of appeals held that the threshold factor of "gross disproportionality" was not satisfied, it did not "'proceed to the comparative analyses' of the second and third factors" of *Harmelin*'s test. *Id.* at 26.[4]

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[4] The court of appeals also rejected petitioner's equal-protection-based challenged to his sentence. Pet. App. 27-28. Petitioner does not renew that challenge in this Court.

ARGUMENT

Petitioner contends (Pet. 4-29) that the 660-month consecutive sentence mandated by 18 U.S.C. 924(c) for his three firearms convictions constitutes cruel and unusual punishment, in violation of the Eighth Amendment. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. a. In *Harmelin* v. *Michigan*, 501 U.S. 957 (1991), this Court held that a mandatory sentence of life imprisonment for the crime of possessing 650 grams of cocaine does not violate the Eighth Amendment's prohibition against "cruel and unusual" punishment. Two Justices concluded that the Eighth Amendment prohibits only certain forms of punishment, and that it does not require proportionality between a non-capital sentence and the crime for which it is imposed, *id.* at 976 (opinion of Scalia, J., joined by Rehnquist, C.J.). Three Justices concluded that "the Cruel and Unusual Punishments Clause encompasses a narrow proportionality principle" under which a "comparative analysis within and between jurisdictions" is appropriate, but that such an analysis is required "only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality," *id.* at 997, 1004-1005 (opinion of Kennedy, J., joined by O'Connor & Souter, JJ.). The court of appeals correctly held that petitioner's sentence is not "grossly disproportionate to the crime." Pet. App. 26.

In addition to other crimes, petitioner was convicted on three counts of possessing a firearm in furtherance of a drug trafficking crime, in violation of Section 924(c)

(Counts 2, 4, and 10). That statute mandates a consecutive minimum sentence of 60 months of imprisonment for using, carrying, or possessing a firearm in connection with a drug-related offense. See 18 U.S.C. 924(c)(1)(A)(i). "In the case of a second or subsequent conviction under this subsection," the statute mandates a consecutive minimum sentence of 300 months of imprisonment. See 18 U.S.C. 924(c)(1)(C)(i). In *Deal* v. *United States*, 508 U.S. 129 (1993), this Court held, as a matter of statutory construction, that the "second or subsequent conviction" provision of Section 924(c) is not limited to distinct judgments of conviction entered in separate criminal proceedings, but is triggered as well when multiple convictions for violating Section 924(c) are obtained in a single proceeding. *Id.* at 132-133. Thus, petitioner was subject to a mandatory sentence of 660 months of imprisonment (60 plus 300 plus 300) for his three Section 924(c) convictions, which are required to be served consecutively to whatever sentence was imposed for petitioner's 13 other serious crimes. See 18 U.S.C. 924(c)(1)(A)(i) and (C)(i).

The court of appeals correctly held that petitioner's sentence of 660 months is not suspect under the Eighth Amendment as "grossly disproportionate" to his crimes. That holding is entirely consistent with the numerous cases in which this Court has considered and rejected similar claims of disproportionality, including: *Harmelin*, in which the Court upheld a life sentence for possession of 650 grams of cocaine by a first-time offender, 501 U.S. at 1001-1005 (opinion of Kennedy, J.); *Rummel* v. *Estelle*, 445 U.S. 263, 285 (1980), which upheld a life sentence with the possibility of parole under a state recidivist statute for three successive convictions for fraudulent use of a credit card to obtain $80 worth of

goods, passing a forged check for $28.36, and obtaining $120.75 by false pretenses; *Ewing* v. *California*, 538 U.S. 11, 28-30 (2003) (opinion of O'Connor, J.), which upheld a sentence of twenty-five years to life under a state recidivist statute for the offense of felony grand theft; *Hutto* v. *Davis*, 454 U.S. 370 (1982) (per curiam), which upheld a 40-year sentence for the crime of distributing nine ounces of marijuana; and *Lockyer* v. *Andrade*, 538 U.S. 63, 77 (2003), which upheld as reasonable a state court's conclusion that two consecutive sentences of twenty-five years to life under a state recidivist statute for two counts of petty theft was not grossly disproportionate. See Pet. App. 20-21 (noting those decisions).

The decision of the court of appeals is also consistent with those of other circuits, which have likewise rejected Eighth Amendment challenges to lengthy prison sentences imposed pursuant to Section 924(c). See, *e.g.*, *United States* v. *Hungerford*, No. 05-30500, 2006 WL 2923703, at *2 (9th Cir. Oct. 13, 2006) (rejecting challenge to a sentence of 1917 months for seven Section 924(c) convictions and related bank robbery convictions); *United States* v. *Beverly*, 369 F.3d 516, 523, 537 (6th Cir. 2004) (upholding a sentence of 71 and a half years for a first-time offender, 65 years of which resulted from four Section 924(c) convictions for driving a getaway car in four bank robberies); *United States* v. *Arrington*, 159 F.3d 1069, 1073 (7th Cir. 1998) (rejecting an Eighth Amendment challenge to a 65-year sentence imposed for four Section 924(c) violations), cert. denied, 526 U.S. 1094 (1999); *United States* v. *Harris*, 154 F.3d 1082, 1084 (9th Cir. 1998) (mandatory consecutive sentences for violations of Section 924(c) amounting to 1141 and 597 months for two co-defendants did not violate the Eighth Amendment).

b. Petitioner makes no explicit attempt to distinguish his sentence as being somehow more disproportionate than the sentences upheld in the cases noted above, with the exception of *Davis*, which petitioner distinguishes on the ground that the defendant in that case "was a recidivist," whereas petitioner "is a first-time offender." Pet. 24 n.11. See also Pet. 6, 27, 29. The contention that petitioner's sentence is unconstitutional because his criminal convictions came in a single proceeding, rather than seriatim, fails to recognize that multiple violations inflict multiple harms and that Congress determined to deal harshly with multiple offenses under Section 924(c) because of the heightened societal dangers posed by firearms in the context of drug trafficking. In *Deal* v. *United States*, *supra*, the Court rejected an argument that the provision in Section 924(c)(1)(C)(i) for consecutive 300-month sentences for each "second or subsequent conviction" should be construed to apply only when the defendant had already been convicted of a Section 924(c) violation in a separate criminal proceeding. The Court reasoned that severe punishment for multiple violations rationally served the purposes of "taking repeat offenders off the streets for especially long periods" and "visiting society's retribution upon repeat offenders more severely." 508 U.S. at 136. The Court found nothing in those "goals [to] defy 'common sense.'" *Ibid.* And it rejected Deal's reliance on the rule of lenity, which depended on Deal's view that his 105-year sentence could not have been intended by Congress because it was "glaringly unjust." *Id.* at 137.

Petitioner's attempt to minimize the seriousness of his use of a gun in connection with drug deals is also directly contrary to Justice Kennedy's rejection—as "false to the point of absurdity"—of the defendant's con-

tention in *Harmelin* that the possession of 650 grams of cocaine was "nonviolent and victimless." 501 U.S. at 1002. Justice Kennedy stressed the larger connection between drugs and violence in society, which justifies a legislature's rational assessment of the need for serious punishment. *Id.* at 1002-1003. See *Smith* v. *United States*, 508 U.S. 223, 239 (1993) ("Whether guns are used as the medium of exchange for drugs sold illegally or as a means to protect the transaction or dealers, their introduction into the scene of drug transactions dramatically heightens the danger to society."). In light of this Court's holding that Harmelin's life sentence for a first-time drug conviction for mere possession with no charge of threatening violence or using firearms, see 501 U.S. at 1021 (White, J., dissenting), is consistent with the Eighth Amendment, the sentence imposed on petitioner, who habitually possessed, carried, and brandished firearms in the course of distributing illegal drugs, is not grossly disproportionate to his offenses. Thus, the court of appeals correctly concluded that petitioner's case was not one of those "rare cases" where the sentence gives rise to an inference of gross disproportionality, and that it was therefore not necessary to conduct a comparative analysis of intra- and interjurisdictional sentences. See *id.* at 997, 1004-1005 (opinion of Kennedy, J.) (comparative analysis is "appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality").

To the extent the Eighth Amendment analysis focuses on a defendant's entire course of criminal conduct and his overall sentence, petitioner's claim of gross disproportionality has even less force. In addition to his Section 924(c) violations, petitioner was convicted on 13

other counts. The maximum statutory penalty that could have been imposed on petitioner for those other counts was 125 years, or 1500 months.[5] He received one day of imprisonment on those counts. Moreover, petitioner's Section 924(c) convictions should not be viewed, as petitioner does, in isolation from the larger criminal conduct of which they were part. Whereas petitioner would have the Court view this as a case of "three acts of possessing (not using or even displaying) * * * guns," in connection with "two $350 marijuana deals," Pet. 28 (quoting Pet. App. 32), the court of appeals was correct to put petitioner's sentence in the context of the full scope of the criminal activity out of which his convictions arose. See Pet. App. 26-27. See *Ewing*, 538 U.S. at 28-30 (opinion of O'Connor, J.) (discussing full scope of defendant's criminal activity, rather than the single act that gave rise to the defendant's conviction and sentence). That conduct reveals a protracted course of dealing in large quantities of marijuana, accompanied by the possession of an arsenal of weapons. Petitioner's "good fortune," Pet. App. 26, in escaping prior punishment does not mitigate the seriousness of his criminal conduct.

2. The principal focus of the petition is its argument that summary dispositions by this Court are problematic

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[5] See PSR ¶ 95 (five years per count on Counts 1, 3, 5, 9 and 13 for possession with intent to distribute marijuana, in violation of 21 U.S.C. 841(a)(1)); PSR ¶ 98 (10 years per count on Counts 6 and 11 (possessing a stolen firearm, in violation of 18 U.S.C. 922(j)), Counts 8 and 12 (unlawful possession of a firearm by a drug user, in violation of 18 U.S.C. 922(g)(3)) and Count 7 (possessing a firearm with an obliterated serial number, in violation of 18 U.S.C. 922(k)); PSR ¶ 99 (10 years on Count 18 (money laundering, in violation of 18 U.S.C. 1957); and PSR ¶ 100 (20 years on Counts 19 and 20 for money laundering, in violation of 18 U.S.C. 1956).

because they are "procedurally unfair to the parties and fraught with peril for practitioners and the lower judiciary," Pet. 8, because they are often "mistaken, imprudent, or muddled," Pet. 13, and because "the jurisprudence on summary dispositions [i]s a mess," Pet. 20. With more specific relevance to this case, petitioner asserts (Pet. 24-27) that *Hutto* v. *Davis* can no longer be considered "good law," Pet. 24-27, principally because it was issued as a per curiam decision summarily reversing the court of appeals, Pet. 20-24. Petitioner argues that this case is "a particularly appropriate vehicle to examine the precedential value of summary dispositions" like *Davis*. Pet. 20.

This Court "reviews judgments," not abstract questions of law with no relevance to the case at bar. *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956). Even assuming that it would be desirable for the Court, in an appropriate case, to address the lower courts' alleged "uncertain[ty] as to the precedential value of summary dispositions on the merits," Pet. 4-5, this case presents no occasion to do so.

Petitioner's contention that this is an appropriate case "to resolve the uncertainty over the precedential value of the *per curiam* opinion in *Hutto* v. *Davis*," Pet. 4, is based upon the way in which the *district court* relied on *Davis*. See Pet. 6-8 (discussing only the district court's reasoning and conclusion that *Davis* controlled its disposition of petitioner's claim). In contrast, the court of appeals' opinion, which this Court is asked to review, does not turn on *Davis* in particular, but on this Court's Eighth Amendment cases more generally. The court of appeals recognized the continuing validity of *Davis*, but based its rejection of petitioner's claim on its conclusion that petitioner failed to satisfy "the first, and

controlling, 'factor' in *Harmelin*, i.e., whether the sentence at issue is grossly disproportionate to the crime." Pet. App. 26. In making that determination, the court of appeals emphasized Congress's prerogative to determine the appropriate punishment for a crime and noted this Court's own pronouncements reinforcing the well-recognized link between drugs and guns. *Ibid.* On that basis, the court of appeals concluded that petitioner's sentence could not be said to be grossly disproportionate to the crimes of possessing, carrying, or brandishing firearms in connection with his drug-dealing activities on three separate occasions. *Ibid.* In its analysis of the legal standard, the court of appeals did summarize *Davis* as one of the five cases in which this Court had rejected a claim of gross disproportionality, *id.* at 20-21, but the court of appeals relied far more heavily on the facts and analysis in *Harmelin* for its conclusion that the sentence for petitioner's use of firearms to "facilitate his drug-dealing activities" was not disproportionate. *Id.* at 26; see *id.* at 23. See also *Hungerford*, 2006 WL 2923703, at *9 n.4 (Reinhardt, J., concurring) (explaining that the court was "foreclosed from holding" defendant's 1917-month sentence for seven Section 924(c) violations "to be in violation of the cruel and unusual punishment clause * * * by *Harmelin* and *Ewing*").

Thus, an opinion along the lines petitioner requests —holding that summary dispositions such as *Davis* are no longer precedential—would not affect the court of appeals' judgment in his case. As a result, this case is a particularly unsuitable vehicle for considering *Davis*'s precedential status (let alone the precedential value of all summary dispositions).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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